dence? He would part with the bed he slept upon rather than seek refuge in the law's exemptions.

Socially, he was not communicative. He was silent, meditative, reflective. He communed with himself. But on the bench his keenest senses were alert, and his quick, penetrating mind caught the point of the controversy amid a web of almost hopeless entanglement. Intuitively he went to the root of the matter, rendering his opinions without delay, and often times without a moment's consideration, but with unerring precision.

The drawing room and the social club had no charm for him. An indulgent and devoted husband and father, he found his sweetest solace in home associations. His tastes were rural. He loved his broad acres; he loved his strong oxen. The scent of new-mown hay was more precious to him than the perfume of Arabia; the full corn in the ear than the fruit of the Indies.

When he laid aside his spotless ermine, and wrote the word "*Finis*" beneath his last judicial signature, he retired to his quiet country home beside the cool waters, under the shadow of the everlasting hills, and breathed his last.

"We shall not look upon his like again."

GRAHAM CLAYTOR.

Bedford City, Va.

ADVERSARY POSSESSION.

THE "OPEN QUESTION."

When the true title holder is in the actual possession of a part of his grant, but outside of the interlock, at the time of the entry of the colorable title holder, does the latter, by an actual possession of a small part of the interlock, gain a prescriptive title to his *pedis positio* only, or to all of the land within the interlock?

This is undoubtedly an open question in this State.

It is true that Mr. Minor (2 Minor's Inst., 4th ed., page 582) and Mr. Hutchinson (Land Titles, secs. 417–422) hold that under such circumstances the colorable title holder acquires title to the whole of the interlock. But Mr. Minor cites only *Green* v. *Liter*, 8 Cranch, 229, in which the senior patentee was not in the actual possession of any part of his grant, and the same Virginia cases cited by Mr. Hutchinson. The Virginia cases are: *Overton* v. *Davisson*, 1 Gratt.

224; *Taylor* v. *Burnsides*, 1 Gratt. 196; *Koiner* v. *Rankin*, 11 Gratt. 420; *Cline* v. *Catron*, 22 Gratt. 392; *Turpin* v. *Saunders*, 32 Gratt. 37. In *Overton* v. *Davisson*, the senior patentee had no actual possession of any part of his grant, and such were also the facts in *Taylor* v. *Burnsides*. In the last case, however, Judge Baldwin, *obiter*, expressed the opinion that where the senior patentee was in actual possession of a part of his land outside of the interlock, the possession of the junior patentee should be held to extend to the limits of his color of title. Judge Stannard expressly dissented on this proposition. Judge Cabell (the only other judge sitting) concurred in the judgment rendered, but it does not appear that he concurred in Judge Baldwin's *dictum*. In *Koiner* v. *Rankin*, Judge Lee cites with approval Judge Baldwin's opinion in *Taylor* v. *Burnsides*, but on another point. Judge Lee is propounding the doctrine that the junior claimant must have actual possession within the interlock in order to commence an adversary possession, and it is in support of this proposition that he adverts to Judge Baldwin's "able and luminous" opinion. In *Cline* v. *Catron* the proposition that is established is again simply that the junior claimant must have actual possession within the interlock. It is true that Judge Anderson is quoted as using the following language, *obiter:*

"But if he [the junior claimant] has an actual occupation and improvement of the interlock, and the elder patentee has actual possession of no part of it, the actual possession of the junior patentee is co-extensive with the limits of his patent."

But in *Turpin* v. *Saunders*, 32 Gratt. 38, Judge Staples said:

"I did not sit in the case of *Cline's Heirs* v. *Catron*, having been of counsel in the lower court. But I am confident this question did not arise either upon the evidence or upon any of the instructions propounded on either side. It is obvious that Judge Anderson did not intend to lay down any such doctrine as the reported opinion would seem to indicate. What I take it he intended to say was, that when the junior grantee has actual possession of a part of the interlock, and the senior grantee has actual possession of no part of his tract, then the possession of the junior grantee is not confined to his *pedis positio*, but is co-extensive with the boundaries called for in his grant. A proposition of law, sound in itself and sustained by the authorities. It is, however, a very different matter, where, as in this case, the senior grantee was in possession of a part of the land within the limits of his grant, although outside of the interlock. The question involved in this latter proposition was discussed by Judge Baldwin in *Taylor's Devisees* v. *Burnsides*, 1 Gratt. 165, 196, 224, and again alluded to in *Overton's Heirs* v. *Davisson*, 1 Gratt. 211, 224; but the judges being divided in opinion, it was not decided. It was also mentioned by Judge Lee in *Kincheloe* v. *Tracewells*, 11 Gratt. 587, 603, and again left undecided. So that it is still an open question in Virginia.

As a decision of the point is not required in the case before us, it is better it shall so remain until a thorough discussion can be had before a full bench. What is now said is only said for the purpose of removing an erroneous impression, which has gone abroad with respect to what was actually decided in *Cline's Heirs* v. *Catron*."

It will thus be seen that Mr. Minor and Mr. Hutchinson are not supported by the Virginia authorities cited.

In *Stull* v. *Rich Patch Iron Co.*, decided Nov, 21, 1895, 23 S. E. 293, 92 Va. 253, the senior patentee was not in actual possession of any part of his grant in 1834, at which time the junior claimant entered under a colorable title on a tract of 119 acres, inside of the senior patent. The junior claimant cleared and fenced a few acres, claiming to the limits of his grant, and held continuous actual possession of the cleared land—the greater part of the land remaining in a state of nature. In 1842 the senior claimant commenced for the first time an actual possession within his grant, but outside of the disputed territory. The judgment of the court was in favor of the junior patentee. This case of course does not raise the question in issue here.

Judge Buchanan, rendering the opinion, said :

"The question involved in this case is not, as counsel for plaintiff contends, the question left undecided in the cases of *Taylor's Devissee* v. *Burnsides* and *Overton's Heirs* v. *Davisson*, 1 Gratt., and in later cases. That question is this, viz.: Does the adverse possession of a claimant under a junior title extend to the whole of his tract, or only to the extent of his enclosures, where there are conflicting grants or deeds to lands causing an interlock, the claimant under the older title being in actual possession of a part of his land outside of the interlock when the claimant under the junior title entered upon and took actual possession of a part of the interlock, claiming title to the whole extent of his boundary? *That is still an open question in this State.*"

In discussing this question it will tend to clearness if it be understood that in using the expression "*constructive possession,*" the writer means always a nominal possession which must be founded on and connected with a *partial actual* possession.

It is a fact that occasionally a writer speaks of the "constructive possession" of a true title holder who is not and has never been in the actual possession of any part of the land. But this use of the expression leads to confusion of thought and should be avoided. "Legal seisin" or "seisin in law" is what the true title holder has when he has no actual possession. Mr. Washburn defines a seisin in law as 'a right to the immediate possession."

The word "possession" implies a physical act or series of acts. One who has, neither in person nor by agent, ever been within a thousand

miles of a piece of land may have the legal seisin of the land; that is, the *right* to the immediate possession thereof. But to speak of the *right* to the possession as a "constructive possession" is exceedingly misleading.

A squatter, having the merest colorable title to a thousand acres of the true title holder's land, who has had an actual possession of but one acre, within the interlock for only a day, has a *constructive possession* of all the land embraced within his colorable title, if the true title holder has no actual possession of any part of his grant.

Certainly an actual possession for one day of an acre does not give the squatter any "immediate *right* to the possession" of the 999 acres remaining. It is obvious that legal seisin and constructive possession may, and often do, have entirely different meanings, and the use of two expressions as if synonymous is utterly confusing.

Therefore whenever the expression "constructive possession" is used, it is understood that an actual possession of some part of the land exists. Using the expression in this sense, the proposition contended for is: *That the constructive possession of a senior patentee can never be ousted by a constructive possession of a junior patentee. In other words, that the merely constructive possession of the junior of part of the interlock, is not an ouster of the senior's constructive possession of that part of the interlock.*

It has always been the law that actual possession of a part of his grant by the senior does not give him possession of another part in the *pedis positio* of a junior patentee. Hence our statute must be construed as in affirmation of the common law.

It reads:

"In controversies affecting real estate, possession of part shall not be construed as possession of the whole, when an *actual* adverse possession can be proved." Code '87, sec. 2740.

It is evident that the words "possession of a part" apply to the possession of the *senior* patentee. The corollary of the statute is—possession of a part shall be construed as possession of the whole, when no actual adverse possession is proved. And if we are to understand that the words "possession of a part" apply to the possession of a junior, it follows that when the senior has no actual possession, a junior who takes actual possession only outside of the interlock, would thereby acquire title to the whole of his grant. Because "possession of a part is possession of the whole, when there is no actual adverse possession." But this is not the law. If it were, the senior could be

disseised without ever having had opportunity of knowing of the ouster. See *Koiner* v. *Rankin*, 11 Gratt. pp. 426, 427 and 428.

Hence, we know that the statute simply means that actual possession of a part of his grant *by the senior* shall not be construed as possession of the whole, when an actual adverse possession *by the junior* can be proved. That is to say, the statute is certainly in affirmation of the common law, and does not (as Judge Baldwin seemed to think) afford any reason for a rule contrary to the great weight of common law authority.

By all authorities, an adverse possession must be visible, notorious and exclusive, hence actual. It follows, therefore, that in affirming the common law the legislature need not have used the word "actual." It would have been sufficient to enact that "possession of a part shall not be construed as possession of the whole, when an adverse possession can be proved."

The use of the words "*actual adverse* possession" is tautological. And this very tautology suggests that the legislature intended to emphasize the fact that there should be no such thing as a constructive possession by a junior when there was any actual possession by the senior.

Language could hardly be found that would more strictly limit the ouster to that part of the interlock in the actual posession of the junior. The statute is equivalent to an ordinance that possession of a part by the senior shall be construed as possession of all the land not in the actual adverse possession of the junior. That this contention is correct is largely borne out by the Virginia decisions, in cases where the actual possession of both senior and junior is within, or partly within, the interlock.

Mr. Minor says:

"If the older patentee is in the actual possession of any part of the land in controversy, at the time of the junior patentee's entry thereon, the latter by such entry gains no adversary possession beyond the limits of his mere enclosure, cultivation, or actual use . . ." 2 Minor's Inst. 582; citing 1 Gratt. 229; 11 Gratt. 420; 22 Gratt. 392, and 32 Gratt. 37.

These authorities undoubtedly sustain the text. In these decisions the Court of Appeals has unquestionably sustained the construction here contended for. These cases hold that under such circumstances, the senior's possession of a part shall be considered possession of all except what is in the actual possession of the junior. Or, in other words, they hold that a constructive possession by the junior does not oust the constructive possession of the senior.

The theory on which this rule must be based, is, that there can not be two contemporaneous constructive possessions of the same land. In other words, the true theory is that, where each is in actual possession of some part of his grant the law gives a constructive possession only to the holder of the true title.

If it were the theory that when a senior sees a junior claimant living on land within the senior's boundary, and negligently permits the intrusion to continue for the statutory period, the senior loses all the land within the junior's colorable title, except that held in actual possession by the senior, the above decisions would have been different. The Court of Appeals would have said to the senior: "You for ten years saw this junior claimant in the actual possession of a part of your land; you knew, or ought to have known, your own boundaries. Since you have been thus negligent we will award to the junior all that his papers call for, except that which you have kept in your actual possession. But the court has said no such thing. In *Overton* v. *Davisson*, Judge Baldwin said (and in this opinion, unlike that in *Taylor* v. *Burmsides*, he was sustained by the whole court):

"But if the older patentee, at the time of such entry of the younger patentee, is in the actual possession of any part of the land in controversy, then the latter can gain no adversary possession, beyond the limits of his mere enclosure, without an actual ouster of the older patentee from the whole of the land in controversy." 1 Gratt. 229.

What reason could there be for this rule exept the one contended for?

The senior has been negligent. With a full knowledge of an actual adversary possession within his boundary, he has slept on his rights and let the statute of limitations bar him. But yet our courts say that he loses nothing except the land in *pedis positio* of the junior. There is no reasonable explanation for such a course of decisions except that the true construction of the statute is that there cannot be two contemporaneous constructive possessions of the same land. Which is the same as saying that a true constructive possession can never be ousted by a *constructive* possession. In other words, the statue means that possession of a part of his grant by the senior, whether within or without the interlock, shall be construed as possession of all not in the *actual* possession of the junior.

When the senior has no actual possession at all (and hence no constructive possession), and the junior keeps actual possession of a small part for the requisite time, he gains a prescriptive title to the limits of his color of title.

This is universally held to be the law, and it illustrates my thesis that there can be but one constructive possession.

The quotation above from *Overton* v. *Davisson* again illustrates it. In that case the part of the interlock which was in the actual possession of neither was held to have been all the time in the possession of the senior. That is to say, there can be but one constructive possession at a time.

Now, how does the case differ because the prior entry and actual possession of the senior is outside of the interlock? His actual possession outside gives him a constructive possession of the interlock. The subsequent entry of the junior within the interlock and taking actual possession of a small part thereof cannot ripen into an adverse title to the balance of the interlock, because the junior's possession of the balance is merely constructive, if it be possession at all, and there cannot be two constructive possessions of the balance of the interlock at the same time.

Mr. Washburn says:

"Two persons cannot be in adverse, constructive possession of the same land at the same time." 3 Washb. Real Prop., p. 128 (485).

Mr. Teideman says:

"Where there is an actual adverse possession by one, there can be no constructive possession acquired by another. Two persons cannot be in adverse constructive possession of the same land at the same time." Teideman, Real Prop., 695.

Other writers arrive at the same result by considering a double constructive possession as a "mixed possession," and saying that in such case the possession is, in law, in the true title-holder.

The expression, "mixed possession," is not a particularly happy one, as it conveys the idea of two concurrent, or alternating, or irregular, actual possessions. But generally the expression is used to convey the idea of two contemporaneous possessions which are both purely constructive.

In the Notes to Adams on Ejectment, page 54, it is said:

"In every case of mixed possession, the legal seisin is according to the title." Citing 10 Mass. 151 and 408.

Again:

"Where two are in possession of land, each claiming an exclusive right, the law adjudges the rightful possession to be in the one who has the right to the land." Citing 3 Serg. & R. 509.

In Angell on Limitations, it is said:

"It is very clear that, where there is a *mixed possession* under a color of title,

or a possession at the same time of more persons than one, *each claiming under a separate colorable title*, the seisin of the estate is in him who has the better title; for, as all cannot be seised, the possession follows the title. This has been so expressly adjudged by the Supreme Court of the United States in an action of ejectment, brought to recover possession of a tract of land in the State of Kentucky, claimed under senior and junior titles; wherein it was also held that the disseisin by one under a junior title, of one under a senior title, is limited by the actual occupancy of the former. The courts, in Maryland, held it to be a clear principle of law that if two persons are in possession of the same land at the same time, the one by title and the other by wrong, it is in his possession who has the best right, and that this principle is founded in justice and general convenience, favors right, and resists wrong and oppression. . . . . .

"The doctrine, as laid down by Chief Justice Parsons, of Massachusetts, is: Although there may be concurrent possession, there cannot be a concurrent seisin of land; and one only being seised, the possession must be adjudged to be in him who has the best right.'" Angell on Limitations, page 414.

In Sedgwick and Wait on Trial of Title to Land, it is said:

"Where two or more claimants are in possession of land, each actually occupying a part of the same, and each *having color of title to the whole*, the junior must yield to the senior possession or title, as to the part claimed by both through constructive possession under color of title, on the same principle the possession of an adverse claimant must be confined to what he actually occupies though he have color of title to the whole tract, if the rightful owner be still in the actual possession of any part of the same, or recovers possession of some part of it. So, also, it may be added, that in all cases of conflict of possessions, or of possessions under different claims of right, or of 'lapping,' or interfering conveyances, where a *constructive possession is called into question*, such possession follows the title, or the better right, or the older color of title, as the case may be." Sedgwick & Wait, page 611, sec. 753.

In *Hunnicut* v. *Peyton*, Mr. Justice Strong said:

"It is true that when a person enters upon unoccupied land under a deed or title, and holds adversely, his possession is construed to be co-extensive with his deed or title, and the true owner will be deemed to be disseised to the extent of the boundaries described in that title. Still, his possession beyond the limits of his actual occupancy is only a constructive one. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, the constructive possession is in him of all the land not in the actual possession of the intruder, *and this, though the owner's actual possession is not within the limits of the defective title.* The reason is plain. Both parties can not be seised at the same time of the same land under different titles. The law therefore adjudges the seisin of all that not in the actual occupancy of the adverse party to him who has the better title. These distinctions are clearly shown in the cases cited from 5 Peters, *supra* (*Clark* v. *Courtney*, 5 Peters 319).

"One who enters upon the land of another, though under color of title, gives no notice to that other of any claim, except to the extent of his actual occupancy. The true owner may not know the extent of the defective title asserted against

him, and if while he is in the actual possession of part of land, claiming title to the whole, mere constructive possession of another, of which he has no notice, can oust him from that part of which he is not in actual possession, a good title is no better than one which is a mere pretense. Such, we think, is not the law." 102 U. S. 370 (Lawyer's Ed., Book 26, page 121).

Another, and still better, mode of expressing the same idea is to say that a constructive possession can never be ousted by a constructive possession.

In Barbour's (Ky.) Digest it is said:

"One constructive possession cannot be ousted by another constructive possession by the claimant under the junior patent." Citing *Jones* v. *McCauley*, 2 Duval, 15; 2 Barb. Dig. p. 1171, sec. 14.

In Tyler on Ejectment, the author says:

"Two persons, representing separate interests, can never be in adverse constructive possession of the same land at the same time, so that from the very nature of the case, the owner of the premises, being, in contemplation of law, in constructive possession of the land when not in the actual possession thereof, cannot be disseised except by an entry and occupancy by another, and only to the extent of such occupancy." Tyler Eject. page 900.

In Barbour's Digest it is said:

"When a grantee enters, his possession, by construction of law, extends to the boundaries of his grant, and if a junior grantee enters on the land, the elder will be ousted of only so much as the junior actually encloses; for though an actual entry will, a constructive entry will not, oust a tenant whose possession is merely constructive." 2 Barb. Dig. page 1173, sec. 58. Citing *Shrieve* v. *Summers*, 1 Dana, 239; *Moss* v. *Currie*, Ib. 267.

As a matter of abstract right between the parties, and as a matter of policy, when the true title holder is actually living on a part of his grant, a subsequent entry thereon and an actual occupation of a few acres should not be held as an ouster of the balance of the interlock.

When the true title holder is in the actual possession of a part of his grant, it is hardly to be presumed that the colorable title holder does not know that he has settled upon land claimed by another. "The law favors the true title," we are told. Yet, if the constructive possession of the true title holder is to be made to yield to a constructive possession of a colorable title holder, the law does not favor the true title. Such a doctrine is equivalent to saying that a colorable title is better than the true title. It is to say that constructive possession under a colorable title is better than constructive possession under the true title. If this be law, once safely seated within the interlock, an actual possession of a quarter of an acre is just as effective as actual, visible, notorious and exclusive possession of a thousand

acres. If this be law, an actual possession of a cabin site is sufficient possession to gain title to one thousand acres, or to one hundred thousand acres. There is no line of demarcation. The limits of the colorable title alone set bounds to what may thus be acquired by a colorable title holder. The very essence of the law of adversary possession is that there must be notice given to the true title holder. To hold this doctrine to be law is to reverse every settled principle of the law. It is to say that the land on which the colorable title holder has done no visible act of possession, over which he has had no dominion, through which the true title holder might have passed once a week for years and never seen the faintest trace of a hostile claim, has come to be the property of a colorable title holder by operation of law!

Let it be remembered, too, that color of title does not have to be recorded. It adds nothing to its effectiveness to record it, and in most instances it is not recorded.

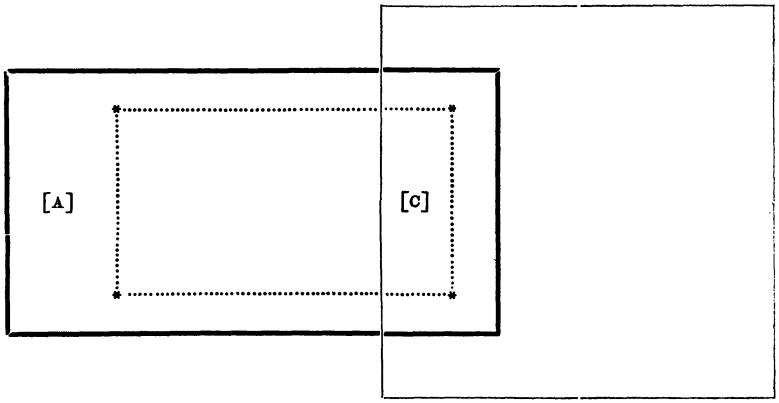
Now let us suppose that the intruder obtains and has recorded a colorable title for, say, ten acres within the true title holder's large boundary, and that he takes his ten acres into actual possession. If the true title holder, reasonably supposing that the junior claims only ten acres, allows him to keep possession of the ten acres for the statutory period—and he might do so, not only from negligence, but from motives of generosity, or because of dislike of litigation, or from various worthy motives—he may, if this doctrine is law, lose ten thousand acres. If the colorable title holder has had in secret all the time color of title for ten thousand acres adjoining his ten acres, he has effectually ousted the true title holder of the ten thousand acres.

It is a maxim of the law that no man can take advantage of his own wrong. Yet if this doctrine be law, the colorable title holder can take advantage of his own wrong. His *bona fides* or *mala fides* is not considered. Hutchinson Land Titles, p. 221. If he had the intention to claim the whole when he entered, he can keep from the knowledge of all people his ten thousand acre deed, and such trickery is to be rewarded by law!

It would seem that the law does not forbid the true title holder of a large boundary to be humane, or to be generous, if he pleases; and on the other hand that it does not encourage knavery. Yet, if this doctrine be law, then the law both forbids the true title holder to be generous to his poorer neighbors, and richly rewards rascality.

And, if Judge Baldwin's *dictum* be law, cases could easily occur where the true title holder is not negligent in any sense, and yet where

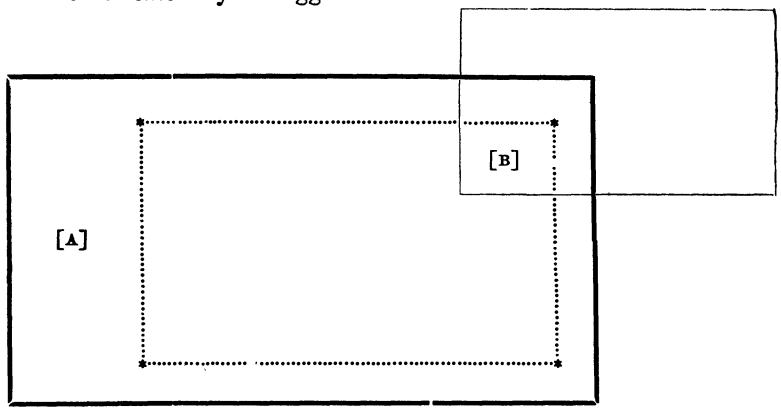
he might lose thousands of acres without ever having known of an adversary claim:



▬ Lines of patent to A for 50,000 acres, issued 1800.
[A] Actual possession of A.
— Lines of patent to B for 50,000 acres, issued 1795.
..... Lines of color of title of C for 30,000 acres, dated 1875.
[C] Actual possession of C.

In this case A knows of C's actual possession; but he cannot remove him by suit, because C could show an older title to be in B. Yet if C has the supposed color of title in his secret possession, A, never having been negligent in the slightest, would, if the opposing doctrine be law, lose the 30,000 acre interlock.

Another case may be suggested:



— Lines of patent to B for 25,000 acres, issued 1795.
[B] B's actual possession.
▬ Lines of patent to A for 100,000 acres, issued 1800.
[A] A's actual possession.
..... Lines of patent, or color of title, to B for 75,000 acres, dated 1875.

In this case, under the assumption that the rule contended for is erroneous, if B, the owner of the senior patent, is disposed to be knavish he could deprive A of 75,000 acres, and yet A never know of the ouster and have never been negligent in the slightest.

Such surely cannot be the law. And nothing could be done that would be more efficacious in upsetting titles, retarding improvement, and in rewarding and encouraging *stealing of land*—if such an expression be permissible—than a decision that would make it law.

A sure guide for a rightful decision in every case is found in the accepted doctrine that a true constructive possession (as distinguished from a mere legal seisin) can never be ousted by a mere constructive adversary possession.

The rule that, where the true title holder has no possession, actual possession of a part of the interlock by the colorable title holder is possession to the limits of his color of title, does not conflict with the doctrine contended for. And it is a rightful rule, founded on the supposition—generally supported by the facts—that the colorable title holder does not know that he is an intruder, or knowing it, believes in good faith that the true title holder has abandoned his claim.

But when the true title holder is in actual possession of a part of his grant at the time of the entry of the junior, the latter generally does know, and in practically every case by a little enquiry could know, that he is inside the claim of another.

And in such case if he wishes to acquire a title by prescription he should take and keep actual, visible, notorious, exclusive possession of all that he claims. In this event the true title holder will know how much the colorable title holder is trying to oust him from, and if he leaves the colorable title holder in such possession for the statutory period he rightly loses that much of his land. But surely he does not lose also an additional boundary, of which the colorable title holder has had no dominion, on which he has done no visible, notorious, continued acts of possession, and to which his claim may never have been known by the true title holder.

Judge Baldwin, in his *dictum* in *Taylor* v. *Burnsides*, 1 Gratt. 201 (197), rightly says that the current of authorities is against the proposition he lays down. And he might have added that the current is overwhelmingly against it.

After much reading, no author and no case, except in West Virginia, has been found which supports Judge Baldwin. There might be here added citations from the numerous authorities supporting the

rule contended for, but they would add little to the strength of the position, as it is admitted that the weight of authority is with us. The following only will be quoted, as it again states the reason why the law is as contended. It is from Judge Woodworth's opinion in *Jackson* v. *Woodruff*, 1 Cow. 286:

"Suppose a patent granted to A, for two thousand acres; B, without title, conveys one thousand acres of the tract to C, who enters under the deed, claiming title, and improves one acre only; this inconsiderable improvement may not be known to the proprietor, or if known, is disregarded for twenty years. Could it be gravely urged, that here was a good adverse possession to the one thousand acres? No such doctrine was ever intended to be sanctioned by the court. If the doctrine contended for prevails, it would sanction this manifest adsurdity, that a possession under Platt's deed, which conveyed no title, would, as to its legal effect, be more beneficial than a possession taken under the proprietors of Treswell's patent, where there is not only title, but a good constructive possession, in consequence of the grant, and actual occupancy and improvement of a part." Angell Lim. 406.

In conclusion let us apply the Virginia decisions to the theory of law contended for, that there cannot be two persons in the contemporaneous *constructive* possession of the same land; or (to otherwise express the same idea) that a true constructive possession can never be ousted by a constructive possession:

1. One class of decisions in Virginia is where the senior claimant has no actual possession at all. In such cases the junior's ouster is to the limits of his grant. As heretofore remarked, this is a just rule, and it in no wise conflicts with the theory contended for. If the senior patentee has no actual possession he has (using the words properly) a mere seisin in law and no constructive possession.

2. A second class of cases is where the senior is in actual possession of a part of the interlock at the time of the entry of the junior. In such cases the junior is restricted to his *pedis positio*.

These decisions are wholly founded on the theory that a constructive possession cannot be defeated or ousted by a constructive possession.

3. The third case is where at the time of the entry of the junior, the senior has no possession; but afterwards (before the expiration of the period of limitation) enters on his grant, but outside of the interlock. This is the case in *Stull* v. *Rich Patch Co.*

In this case it was rightly held that the junior's constructive possession to the limits of his grant was not ousted by the *constructive* possession of the senior of the interlock.

Certainly in every Virginia case the court has recognized and acted on the truth of the theory herein above expressed. In every case, while a mere legal seisin can be defeated by constructive adverse possession, it is held that a true constructive possession, whether of the junior or of the senior, cannot be ousted by a constructive possession.

H. C. McDowell, Jr.

Big Stone Gap, Va.